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No. 89-1035

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CSX TRANSPORTATION, INC.,
Petitioner,
v.
WILLIAM L. CALDWELL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION OF NORFOLK SOUTHERN CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* NORFOLK SOUTHERN CORPORATION IN SUPPORT OF PETITIONER

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

January 19, 1990

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MOTION OF NORFOLK SOUTHERN CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, Norfolk Southern Corporation ("Norfolk Southern") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed by CSX Transportation, Inc. in this case.[1]

At issue in this case is the constitutionality of a Virginia statute (Va. Code § 8.01-265 (1984)) that has the effect of permitting application of the doctrine of *forum non conveniens* in cases where the more con-

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[1] Counsel for Petitioner has granted its written consent to the filing of the attached brief, while counsel for Respondent has refused to grant such consent.

venient forum is located within the Commonwealth of Virginia, but absolutely prohibiting application of the doctrine in cases where the more convenient forum is located outside of Virginia. This issue arises in the context of a suit filed by a railroad employee against his railroad employer seeking monetary damages for a work-related injury pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*

Norfolk Southern is a non-carrier holding company that, *inter alia*, owns all of the outstanding common stock of Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern").[2] Through these subsidiaries, Norfolk Southern operates the second largest freight-hauling railroad system in the Eastern United States, with combined rail trackage of approximately 17,000 miles extending from Canada to Florida and from the East Coast to Kansas City. Norfolk Southern and its railroad subsidiaries have over 30,000 employees, virtually all of whom are covered by the provisions of FELA. From 1985 through 1989, more than 3,400 FELA lawsuits were filed against Norfolk Southern, with over 1,400 cases in 1989 alone. Norfolk Southern, N&W and Southern are each incorporated in the Commonwealth of Virginia, where Norfolk Southern also maintains its corporate headquarters.

Because of its status as a Virginia corporation subject to suit in Virginia courts on FELA claims brought by rail employees for alleged work-related accidents occurring in any one of the many states in which it conducts rail operations, Norfolk Southern has a significant financial interest in the outcome of this case, and in the validity of Virginia Code § 8.01-265. As in Respondent's case, many of these FELA suits against Norfolk Southern have involved alleged work-related accidents that occurred outside of Virginia and had no connection what-

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[2] Unless otherwise indicated, references herein to Norfolk Southern shall include N&W and Southern.

soever to the plaintiff's chosen forum. In many instances, defending such suits in Virginia imposes significant expense and burden on Norfolk Southern, which must bear the cost of bringing necessary witnesses from distant locations to appear at trial, and which in some cases is unable to secure the testimony of essential witnesses, especially attending physicians, who may be outside the scope of the Virginia court's subpoena power. As a direct result of Virginia Code § 8.01-265, and the Virginia Supreme Court's decision sustaining its validity, however, Norfolk Southern is prohibited from seeking, on *forum non conveniens* grounds, the dismissal or tranfer of these and other FELA actions to more convenient forums, regardless of the expense and prejudice imposed on Norfolk Southern by the plaintiff's choice of an inconvenient forum, and even though Virginia law would permit transfer on *forum non conveniens* grounds when the more convenient forum is located *within* Virginia.

As a major railroad system subject to FELA, Norfolk Southern has a vital interest in ensuring that FELA operates in a fair and equitable manner and that the procedural requirements applicable to state court FELA actions do not impose unreasonable burdens and expense on defendant railroads such as Norfolk Southern. This interest extends to ensuring that FELA cases are tried in the most convenient forum available and that state *forum non conveniens* rules do not irrationally discriminate between in-state and out-of-state FELA causes of action in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Accordingly, as one of the two railroad systems (along with Petitioner) most directly and adversely affected by the discriminatory application of the doctrine of *forum non conveniens* mandated by the Virginia statute at issue in this case, Norfolk Southern requests leave to submit this *amicus curiae* brief in support of the petition for a writ of certiorari in order both to stress the importance

of the issue herein to Norfolk Southern and to the rail industry as a whole, and to identify the Equal Protection restraints on the application of *forum non conveniens* principles in FELA cases. Norfolk Southern respectfully requests that its motion for leave to file the attached brief as *amicus curiae* be granted for these purposes.

Respectfully submitted,

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

January 19, 1990

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a state statute that permits application of the doctrine of *forum non conveniens* when the more convenient forum is located *within* the state, but absolutely prohibits application of the doctrine when the more convenient forum is located *outside* the state, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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BRIEF FOR *AMICUS CURIAE* NORFOLK SOUTHERN CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus curiae Norfolk Southern Corporation ("Norfolk Southern") is a non-carrier holding company that, *inter alia*, owns all of the outstanding common stock of both Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern").[1] Through these subsidiaries, Norfolk Southern operates the second largest freight-hauling railroad system in the Eastern United States, with combined rail trackage of approximately 17,000 miles extending from Canada to Florida and from the East Coast to Kansas City. Norfolk Southern and its railroad subsidiaries have over 30,000 rail operating employees, almost all of whom are covered by

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[1] Unless otherwise indicated, references herein to Norfolk Southern shall include N&W and Southern.

the provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*

FELA authorizes railroad workers to sue their employer under a negligence-based standard for damages resulting from on-the-job injuries. See 45 U.S.C. § 51. Over the last five years, Norfolk Southern employees have made over 19,000 claims under FELA. Although many of these claims are settled without litigation, FELA claimants have filed more than 3,000 lawsuits against Norfolk Southern during that period. From 1985 through 1989, Norfolk Southern paid out in excess of $350 million in satisfaction of FELA claims. In addition to payments made directly to FELA claimants, Norfolk Southern bears an annual expense of approximately $12 million in litigation and associated costs arising from FELA claims. FELA claims thus represent for Norfolk Southern a significant (and, indeed, growing) expense of doing business as a railroad.[2]

Although the large majority of FELA claims are paid without litigation, from 1985 through 1989, 3,427 FELA lawsuits were filed against Norfolk Southern. In 1989 alone, Norfolk Southern was named a defendant in 1,422 FELA actions—over four times the number of lawsuits as in 1985. As the number of FELA lawsuits has increased, the forum shopping of plaintiffs has likewise increased. Of the 1,422 FELA actions filed in 1989 against Norfolk Southern, only 594 were filed in the state

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[2] FELA claims are also a significant cost to the railroad industry as a whole. Although railroad employment has declined by more than 40 percent and reported railroad injuries fell by more than half during the 1980s, total FELA payouts by rail carriers more than doubled from $398 million in 1981 to $811 million in 1988. *See Federal Employers' Liability Act: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (prepared statement of William H. Dempsey, President of the Association of American Railroads) at 6. In 1988 alone, over 38,000 FELA claims were reported, and plaintiffs filed over 4,000 FELA lawsuits. *Id.* at 8.

where the cause of action arose and only 559 were filed in the state of the plaintiff's residence.[3]

FELA permits these plaintiffs to choose from a number of potential venues, including state and federal courts located in the state in which the railroad defendant is incorporated or in which it does business, even if the plaintiff's claim did not arise in and has no connection to that state. See 45 U.S.C. § 56. Because personal injury jury verdicts are perceived to be greater in certain localities than in others, a significant number of FELA actions are filed by out-of-state plaintiffs in state court venues situated far from the situs of the accident which gave rise to the FELA claim and far from the residences of witnesses and the plaintiff. Once such an FELA action is filed in a state court having no connection to the cause of action, a railroad defendant's only recourse in obtaining a fair trial in a convenient forum is through the state's *forum non conveniens* procedure.

The Virginia Circuit Court for the City of Portsmouth, the trial court in which Respondent filed his FELA action in the instant case, is one of the venues particularly favored by forum-shopping FELA plaintiffs. Virginia recognizes the doctrine of *forum non conveniens* by statute (Va. Code Ann. § 8.01-257 (1984)), but irrationally discriminates between causes of action arising within the state and those arising outside of the state by permitting Virginia courts to transfer an action to a more convenient forum *inside* Virginia while at the same time prohibiting *any* transfer or dismissal of an action on

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[3] In many of the 594 cases filed where the accident occurred, the plaintiff also lived in that state. Thus, with respect to statistics relating to Norfolk Southern's FELA cases, there is substantial overlap between the number of cases filed in the state where the cause of action arose and the state where the plaintiff resides (*i.e.*, if a FELA plaintiff lives in Virginia, his accident occurred in Virginia, and he sues in Virginia, then his case is included in both categories).

forum non conveniens grounds when the more convenient forum happens to be located *outside* the state. See Va. Code Ann. § 8.01-265 (1984). Thus, while Virginia expressly recognizes the policies underlying the *forum non conveniens* doctrine, it refuses to apply those policies in precisely those cases in which the plaintiff's chosen forum would impose the greatest burden, expense and inconvenience on a railroad defendant—when the more convenient forum is located outside of Virginia.

Portsmouth, Virginia is not the only "happy hunting ground" (see Pet. App. 45a (Russell, J., dissenting)) for FELA plaintiffs. In fact, neighboring Norfolk is likewise a favored venue for forum-shopping plaintiffs. From 1985 through 1989, 96 FELA cases were filed against Norfolk Southern in the Virginia Circuit Court for the City of Norfolk. Thirty-six of the causes of action arose in Virginia, and 37 of the plaintiffs were Virginia residents. Several other state courts—including Madison County, Illinois, and Brooke County, West Virginia—have come to be preferred by FELA plaintiffs and have been flooded with FELA lawsuits having no connection to the jurisdiction.[4] During the 1985 through 1989 period, FELA plaintiffs sued Norfolk Southern 276 times in Jefferson, Alabama. Only 50 of the accidents occurred in

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[4] *See Bland* v. *Norfolk & W.Ry. Co.*, 116 Ill.2d 217, 506 N.E.2d 1291, 1297 (1987) ("this court has previously taken notice of the congested dockets of the circuit court of Madison County and has recognized that the congestion is aggravated by the presence of cases similar to the plaintiff's—nonresident FELA cases that have little or no connection with Madison County"); *Espinosa* v. *Norfolk & W.Ry. Co.*, 86 Ill.2d 111, 427 N.E.2d 111, 113-14 (1981) (of 438 FELA cases filed in Madison County courts from 1976 to 1978, 156 involved accidents outside Illinois, and of those 156 cases, 83 plaintiffs resided in states other than Illinois); *Gardner* v. *Norfolk & W.Ry. Co.*, 372 S.E.2d 786, 787 (W.Va. 1988) (of 103 FELA cases filed in Brooke County, none involved residents of Brooke County and 60 involved nonresidents of West Virginia; none of the fact witnesses or expert witnesses resided in Brooke County), *cert. denied*, 109 S.Ct. 1132 (1989).

Alabama, and 57 plaintiffs lived in Alabama. In Brooke County, West Virginia, 1,043 cases were filed from 1986 through 1989, and only 239 of the causes of action arose in West Virginia and 233 plaintiffs resided there.

Because Norfolk Southern, N&W and Southern are each Virginia corporations (like Petitioner), they are subject to suit under FELA in the state courts of Virginia. Accordingly, each of these rail carriers may be sued in Virginia state court on an FELA cause of action arising anywhere in the United States. As a result of the Virginia statutory provision at issue in this case, Norfolk Southern and Petitioner—regardless of how prejudicial and burdensome it may be to defend a particular FELA suit in Virginia—are unable to obtain dismissal or transfer of such an action to a more convenient forum under the doctrine of *forum non conveniens* if that forum is outside of Virginia. This is true despite the fact that Virginia has explicitly recognized the doctrine by statute and even though transfer on *forum non conveniens* grounds would be available if the more convenient forum happened to be located within the Commonwealth of Virginia.

Norfolk Southern has a vital interest in ensuring that FELA operates in a fair and equitable manner and that procedural requirements applicable to state court FELA actions do not impose unreasonable burdens on defendant railroads such as Norfolk Southern. Norfolk Southern's interest extends to ensuring that FELA cases are tried in the most convenient forum available and that *forum non conveniens* rules do not frustrate the operation of FELA by irrationally discriminating between in-state and out-of-state causes of action in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Norfolk Southern has a significant stake in this case because the challenged statute forces Norfolk Southern to defend FELA lawsuits in Virignia forums where the alleged work-related accidents

did not occur, where none of the witnesses reside, and where plaintiffs do not reside, even though more convenient forums outside of the state may be readily available to the parties and fully competent to enforce the plaintiff's FELA rights.

STATEMENT

Respondent William L. Caldwell, a North Carolina resident employed by Petitioner, was injured in Charlotte, North Carolina, by the sound of a locomotive's horn which caused hearing loss and "other disabilities." Pet. App. 24a. All of the fact witnesses, including Respondent himself, resided in or near Charlotte, North Carolina, as did Respondent's three attending physicians. Pet. App. 9a, 23a, 36a-37a, 65a. Rather than file an FELA suit in federal or state court in North Carolina or in federal court in Virginia, Respondent elected to bring his FELA suit in the Virginia Circuit Court for the City of Portsmouth, characterized by the dissent below as a "happy hunting ground" for FELA plaintiffs. Pet. App. 45a (Russell, J., dissenting).

Petitioner filed a timely motion to dismiss the action on *forum non conveniens* grounds, arguing that Portsmouth was an inconvenient forum and that the appropriate forum was in Charlotte, North Carolina. Pet. App. 4a-8a. Virginia law expressly recognizes the policies underlying the doctrine of *forum non conveniens*. See Va. Code Ann. § 8.01-257 (1984). While permitting a trial court to transfer an action to "any fair and convenient forum" within Virginia, however, Virginia Code Section 8.01-265 bars a court from dismissing an action on *forum non conveniens* grounds under *any* circumstances if the more convenient forum is located *outside* of Virginia. Petitioner contended that this so-called "non-dismissal" provision of Section 8.01-265 contravened the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause

of the United States Constitution, and also violated certain provisions of the Virginia Constitution. Pet. App. 6a-7a. Although the trial court recognized that application of the federal *forum non conveniens* doctrine (which permits transfer to a more convenient forum) would clearly mandate the adjudication of Respondent's claims in a North Carolina court (Pet. App. 10a), it rejected Petitioner's constitutional challenges and, on the basis of Section 8.01-265, denied Petitioner's motion to dismiss. Pet. App. 11a. After trial, the jury returned a verdict of $1,500,000 against Petitioner. Pet. App. 14a-15a.[5]

On appeal to the Supreme Court of Virginia, Petitioner renewed its constitutional challenges to the non-dismissal provision of Section 8.01-265. In a four-to-three decision, the Virginia Supreme Court upheld the validity of this provision. With respect to Petitioner's Equal Protection claim, the court below recognized that the statute created a classification that afforded differing treatment to causes of action arising within Virginia and to those arising out-of-state. Pet. App. 29a. But the court held that this disparate treatment was rationally related to either of two separate state interests.

First, the court below asserted that "there is a significant distinction between the transfer of an action and its dismissal" in that dismissal (but not transfer) might somehow jeopardize a plaintiff's ability to vindicate his or her rights under FELA in another court "because of the bar of the statute of limitations or some other reason." Pet. App. 29a-30a. Second, the Virginia Supreme Court observed that the state's long-arm statute (Va. Code Ann. §§ 8.01-328 to -330 (1984)) authorizes the

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[5] The trial court subsequently granted Petitioner's motion for remittitur and reduced the verdict to $1,000,000. Pet. App. 16a. In upholding the remittitur, the Virginia Supreme Court observed that "Caldwell's injury and disability have affected him, but the evidence does not indicate a substantial amount of pain, suffering, or embarrassment arising out of the hearing loss." Pet. App. 44a.

exercise of personal jurisdiction to the maximum extent permitted by the Due Process Clause of the Fourteenth Amendment, and held that application of the *forum non conveniens* doctrine to require that a cause of action initially filed in Virginia be brought in a different state would detract from this legislative intent. Pet. App. 30a-31a. Without suggesting how the policies underlying the long-arm statute provided a rational basis supporting Section 8.01-265's restriction on *forum non conveniens*, the court then concluded that "[t]he reconciliation of these competing policies is a matter of legislative discretion." Pet. App. 31a.

Three justices dissented, concluding that "[t]here is . . . no conceivable rational basis for the statute." Pet. App. 49a. The dissent noted that "[a]ttorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the localities in which the accident occurred." Pet. App. 45a-46a. To emphasize the irrational discrimination that could result from the Virginia statute, the dissent (Pet. App. 48a) cited the following example:

> [I]n a hypothetical case, a trainman suffers injury on a westbound train passing through Bristol, Virginia. If he seeks to recover for his injuries in Portsmouth, the defendant railroad may, for good cause shown, obtain a transfer of the case to Bristol, where the cause of action arose, pursuant to Code § 8.01-265. On the other hand, if the accident occurs a few seconds later, when the train has crossed into Bristol, Tennessee, the plaintiff may force the railroad to defend itself in Portsmouth, Virginia.

The dissent explained that neither of the grounds cited by the majority provided a rational justification for such discriminatory treatment with respect to the availability of the *forum non conveniens* doctrine. First, the dissent found no basis for the majority's concern that dismissal

of an action on *forum non conveniens* grounds might jeopardize the plaintiff's ability to litigate his or her FELA claims in a court outside of Virginia. The dissent explained that, because dismissal of an action on *forum non conveniens* grounds is always discretionary, the trial court could properly dismiss an FELA case only if another convenient forum were actually available to the plaintiff, and also could stay the action pending a final determination of whether another forum is, in fact, available. Pet. App. 50a-51a. The dissent further concluded that the second justification cited by the majority —Virginia's policy to extend the personal jurisdiction of its courts to the limits of the Due Process Clause—was irrational in that the long-arm statute was not implicated at all in this case and that the majority's argument had confused venue and jurisdiction. Pet. App. 51a-53a.

SUMMARY OF ARGUMENT

This case presents the important question whether, in a Federal Employers' Liability Act case, a state statute that permits application of the *forum non conveniens* doctrine if the more convenient forum is situated *within* the state, but absolutely prohibits *any* application of the doctrine if the more convenient forum is located *outside* the state, violates the Equal Protection Clause of the Fourteenth Amendment. A state simply cannot, consistent with the dictates of the Equal Protection Clause, apply its *forum non conveniens* doctrine in a manner that, as here, discriminates without any rational basis against causes of action arising out-of-state. This discriminatory application of the doctrine of *forum non conveniens* imposes a significant burden and expense on the railroad industry and frustrates the fair and efficient administration of the federal FELA program in the state courts.

The adverse effects of the challenged provision are particularly acute because two of the three principal

railroad systems operating in the Eastern United States —Petitioner and Norfolk Southern—are Virginia corporations and, as such, are always subject to suit in Virginia courts on FELA causes of action regardless of the situs of the accident. As a result, potentially all of the many FELA claims brought against these major railroad systems may be subject to the discriminatory *forum non conveniens* provision at issue in this case. Accordingly, this case merits review by this Court.

ARGUMENT

I. THE PETITION RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO NORFOLK SOUTHERN AND TO THE RAILROAD INDUSTRY AS A WHOLE CONCERNING THE FAIR AND NON-DISCRIMINATORY APPLICATION OF *FORUM NON CONVENIENS* PRINCIPLES IN STATE COURT ACTIONS UNDER FELA.

Respondent elected not to bring his FELA action in North Carolina, where the accident occurred, where he resides, and where the fact witnesses and attending physicians were located and within the subpoena power of the court. Respondent also elected not to file his suit in a federal court in Virginia, which could have (and most likely would have) transferred the action to a federal court in North Carolina pursuant to the federal transfer statute which incorporates the basic principles of *forum non conveniens*. See 28 U.S.C. § 1404(a); *Ex parte Collett*, 337 U.S. 55 (1949). Instead, Respondent filed his FELA lawsuit in the Virginia Circuit Court for the City of Portsmouth, a forum that had absolutely no relation to the cause of action but which has apparently developed a reputation for especially generous jury verdicts in personal injury actions. By filing his out-of-state cause of action in a state court in Virginia, Respondent's choice of forum became absolutely immune from challenge on *forum non conveniens* grounds by virtue of the discriminatory effect of the non-dismissal provision of Virginia Code § 8.01-265.

Several procedural provisions applicable to FELA cases enable plaintiffs, such as Respondent, to select from one of several forums in which to file suit against railroads, and place railroads, such as Norfolk Southern, at the mercy of state *forum non conveniens* rules. First, an FELA plaintiff may bring suit in either federal or state court, because the jurisdictions of federal and state courts under the statute are concurrent. 45 U.S.C. § 56. Second, if the plaintiff elects to sue in state court, the defendant railroad may not remove the case to federal court. 28 U.S.C. § 1445(a). Third, FELA's broad venue provisions permit a plaintiff to bring an action in any district in which the defendant resides, the cause of action arose, or the defendant does business. 45 U.S.C. § 56.[6] Finally, federal *forum non conveniens* transfer rules (see 28 U.S.C. § 1404(a)) do not apply to FELA actions brought in state courts. *Pope* v. *Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 383-84 (1953). Rather, FELA actions brought in state court are governed by the state's *forum non conveniens* procedures. *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1, 5 (1950).

As a result, if state *forum non conveniens* rules do not afford Norfolk Southern and other rail carriers the opportunity to require an FELA plaintiff to refile his or her case in a more convenient forum, whether within the state or outside of the state, the defendant railroad will be faced with the burden and expense of litigating in a forum that has no connection to the cause of action. Once a plaintiff selects a state court forum in Virginia, a railroad defendant is subject to the discriminatory *forum non conveniens* rules of that state. If the more convenient forum is located within Virginia, the *forum non*

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[6] Decisions of this Court have established that the Commerce Clause imposes certain minimal limitations on venue in FELA actions. In particular, venue may be constitutionally permissible if the rail carrier's lines run through the territory of the court's jurisdiction, but may not be permissible if the defendant railroad operates no rail lines within the jurisdiction of the forum court. *See Denver & R.G.W.R.R. Co.* v. *Terte*, 284 U.S. 284 (1932); *Hoffman* v. *Missouri ex rel. Foraker*, 274 U.S. 21 (1927).

conveniens doctrine applies, and the trial court may therefore transfer the FELA case to that forum. But if the cause of action arose outside of Virginia, the *forum non conveniens* doctrine is unavailable, and the railroad defendant is forced to incur the expense and burden of defending the case in Virginia.

The trial of FELA actions in an inconvenient forum imposes a significant burden and expense on railroads beyond the normal inconvenience and costs associated with defending an FELA lawsuit in the forum where the accident occurred. The additional expense and burden on rail carriers result from several factors. First, because many occurrence witnesses in FELA lawsuits are railroad employees, adjudication of an FELA suit in a distant state results in a significant disruption of operations and loss of employee productivity as these workers must take time away from their normal duties to travel to the foreign jurisdiction for trial. Second, the defendant railroad must pay travel expenses for these witnesses and other witnesses who provided medical care to the plaintiff. Third, the railroad bears additional litigation expense arising from the need to transport documents and other physical evidence to the site of the trial. Finally, these distant venues are not selected by chance, but rather because FELA plaintiffs' attorneys shop for a forum that they believe will provide the largest jury award. While it is impossible to quantify the differential between the actual jury award in an FELA case tried in Portsmouth or Norfolk compared with the award that would have been returned in the forum outside Virginia where the cause of action arose, there can be little doubt that Portsmouth and Norfolk verdicts are widely perceived to be larger than verdicts in comparable cases adjudicated outside of Virginia. That additional, but unquantifiable, cost is significant.

Moreover, if an FELA action is filed in an inconvenient state court venue, the railroad may be significantly prejudiced at trial. First, the railroad would normally lack the use of process to compel the attendance at trial

of out-of-state occurrence witnesses and treating physicians. Second, even if a jury view of the accident scene would provide some of the most probative evidence at trial, a view is simply not available when the suit is tried in a location far distant from the scene of the accident.

The problem of defending FELA actions far from the location of any accident affects more than the railroad industry itself. As Justice Frankfurter once wrote: "The so-called 'convenience' of a railroad concerns the important national function of which the railroads are the agency. As in other phases of federal railroad regulation, the interests of carriers, employees, and the public must be balanced." *Baltimore & O.R.R. Co.* v. *Kepner*, 314 U.S. 44, 58 (1941) (Frankfurter, J., dissenting). Here, the application of the non-dismissal provision of Virginia's *forum non conveniens* statute adversely affects the interests of rail carriers by imposing additional burden and expense on the railroad industry and, because any increased costs ultimately are passed on to consumers, the public as a whole.

II. THE NON-DISMISSAL PROVISION OF VIRGINIA'S *FORUM NON CONVENIENS* STATUTE IMPERMISSIBLY DISCRIMINATES BETWEEN IN-STATE AND OUT-OF-STATE CAUSES OF ACTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

As applied to FELA actions arising from out-of-state accidents, the non-dismissal provision of Virginia Code § 8.01-265 violates the Equal Protection Clause of the Fourteenth Amendment. There is little question that the Virginia statute creates a classification dividing FELA (and other) causes of action into those that arise within Virginia and those that arise outside of Virginia. There can also be no doubt that the Virginia statute discriminates between these two categories, permitting the application of the *forum non conveniens* doctrine if the cause of action arose within Virginia but prohibiting the application of the doctrine if the cause of action arose outside the state.

In the venue context, the Court has stated that the Equal Protection Clause "does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but *it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.*" *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927) (emphasis added). Unless heightened scrutiny is warranted (and neither Petitioner nor *amicus curiae* contends that it is), a legislative classification must be "rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). This Court has emphasized that this standard "is not a toothless one." *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976).[7] To pass scrutiny under the Equal Protection Clause, a challenged classification must meet two tests:

> (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Western & Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648, 668 (1981). Here, the classification established by the Virginia *forum non conveniens* statute is arbitrary and is not rationally related to any legitimate state interest.

The Virginia Supreme Court proffered two justifications that it claimed were legitimate state interests to which the non-dismissal provision of Virginia Code § 8.01-265 is rationally related.[8] Contrary to the sweeping as-

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[7] *See Williams* v. *Vermont*, 472 U.S. 14, 23-24 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 877-80 (1985); *Zobel* v. *Williams*, 457 U.S. 55, 61 (1982).

[8] Because these were the only two grounds relied on by the Virginia Supreme Court, this Court should limit its review to these grounds and the State will be free to advance additional grounds, if any exist, on remand. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 875 (1985).

sertions of the Virginia Supreme Court, there is no rational basis for the distinction created by the Virginia statute. There is no legitimate reason why suits based on causes of action that arise within the state may be transferred to a more convenient forum, while causes of action that arise outside the state must proceed in the inconvenient forum merely because the more convenient forum happens to be located outside of Virginia.

1. The court below first asserted that the challenged provision's different treatment of in-state and out-of-state causes of action was rationally justified by what it regarded as a "significant distinction" between *forum non conveniens* dismissals and transfers. Pet. App. 29a. The court declared that the dismissal of an action on *forum non conveniens* grounds, but not a transfer of an action to a more convenient court within the state, involves a risk that the plaintiff might be barred from asserting his or her cause of action in a second court by the running of the statute of limitations. Pet. App. 29a-30a. Even assuming that avoiding this risk is a legitimate state interest, however, the non-dismissal provision of Virginia's *forum non conveniens* statute is simply not rationally related to this interest.

The decision below is predicated on a fundamental misunderstanding of the application of the FELA statute of limitations. At bottom, there is *no* additional risk to an FELA plaintiff resulting from a *forum non conveniens* dismissal than from a *forum non conveniens* transfer. If an FELA plaintiff files his or her original complaint within the time period specified in the FELA statute of limitations, his or her rights to prosecute the suit are preserved—even in the event that the court in which the suit was filed subsequently determines that it should be dismissed on *forum non conveniens* grounds.

To reach the conclusion that this interest supports the statute, the Virginia Supreme Court ignored two essential principles. First, there is no risk of inconsistent state statutes of limitations because a single federal statute of

limitations applies to all FELA cases, regardless of whether they are brought in federal or state courts. Section 6 of FELA establishes a three-year statute of limitations that governs all FELA cases. 45 U.S.C. § 56; see *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 425-26 (1965). Moreover, it is well settled that "the FELA limitation period is not totally inflexible." *Burnett*, 380 U.S. at 427 (citations omitted).

Second, this Court has specifically held that the FELA statute of limitations is tolled if a timely FELA action is dismissed on venue grounds. In *Burnett*, this Court held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." *Id.* at 428. Thus, if a timely-filed FELA action is dismissed because of improper venue, the applicable statute of limitations is tolled for the duration of the state suit and until the state court dismissal order becomes final, either by the running of the time to appeal that order or by the entry of final judgment on appeal, *id.* at 435-36, permitting the plaintiff to re-file the suit in a proper venue. This tolling rule enunciated in *Burnett*, where the action was dismissed because of *improper* venue, is equally applicable to dismissal of actions on *forum non conveniens* grounds.[9] To determine whether the statute of limitations should be tolled, the Court in *Burnett* observed that "the basic inquiry is whether the congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427.[10] Toll-

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[9] In fact, there are more compelling reasons to toll the statute of limitations when the plaintiff's lawsuit has been filed in a *proper*, but inconvenient, venue than when (as in *Burnett*) it is filed in an *improper* venue.

[10] The *Burnett* Court reasoned that a contrary result—refusing to toll the statute of limitations when a timely-filed FELA action is brought in an improper venue—would "produce a substantial nonuniformity [in FELA cases] by creating a procedural anomaly."

ing of the limitations period when a case is dismissed because there is a more convenient venue also would further the purposes of FELA. *Cf. id.* at 434.[11]

In addition, by ignoring the practical aspects of *forum non conveniens* dismissals, the court below incorrectly assumed that the application of *forum non conveniens* dismissal might bar Respondent's case. Courts can, and do, however, take a number of steps to protect the rights of an FELA plaintiff. As an initial matter, the court can properly dismiss the action on *forum non conveniens* grounds *only* if there is, in fact, an alternative venue available. The predicate for any dismissal on *forum non conveniens* grounds is that there is, in fact, an *available*, alternative forum in which the plaintiff can litigate his or her claims. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). If there is any doubt whether this alternate venue is proper, the court could stay, rather than dismiss, the FELA action pending a test of the venue in the second court. See Pet. App. 51a (Russell, J., dissenting). Moreover, courts often require an FELA defendant seeking *forum non conveniens* dismissal to waive the statute of limitations defense if the new suit is filed in the more

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Burnett, 380 U.S. at 433. In *Burnett*, the anomaly would occur because an FELA case brought in an improper venue in federal court could be transferred to a proper venue under 28 U.S.C. § 1406(a) and would not be barred by the running of the statute of limitations, while an FELA case filed in state court could be barred by the statute of limitations because there is no analogous state transfer statute. *Id.* at 433-34. In the instant case, if a dismissal of Respondent's suit on *forum non conveniens* grounds did not toll the running of the limitations period, substantial nonuniformity would similarly result between FELA actions brought in federal court and those filed in state court.

[11] Courts are unanimous in recognizing that the holding in *Burnett* also applies to *forum non conveniens* dismissals. *See, e.g., Reed* v. *Norfolk & W.Ry. Co.*, 635 F. Supp. 1166, 1168 (N.D. Ill. 1986); *Missouri Pacific R.R. Co.* v. *Tircuit*, No. 89-IA-177 (Miss. Nov. 29, 1989) (available on LEXIS); *Gibbs* v. *Illinois Central Gulf R.R. Co.*, 420 N.W.2d 446, 448 (Iowa 1988) (assuming *Burnett* applies to *forum non conveniens* dismissals); *Mobley* v. *Southern Ry. Co.*, 418 A.2d 1044, 1050 (D.C. 1980).

convenient forum within a certain period of time. See, *e.g., Missouri Pacific R.R. Co.* v. *Tircuit*, No. 89-IA-177 (Miss. Nov. 29, 1989) (available on LEXIS); *Satkowiak* v. *Chesapeake & O.Ry. Co.*, 106 Ill.2d 224, 235, 478 N.E.2d 370, 375 (1985); *State ex rel. Southern Pacific Transportation Co.* v. *Frost*, 102 N.M. 369, 695 P.2d 1318, 1320 (1985).[12] If the defendant refuses to waive the statute of limitations defense in the second forum, the court will grant the plaintiff leave to refile in the dismissing forum.[13]

In sum, the Virginia Supreme Court's expressed concern about the risk of *forum non conveniens* dismissals to the plaintiff's ability to pursue his or her claim is totally irrational. Under widely-accepted principles of *forum non conveniens*, a dismissal of an action brought in an inconvenient forum *always* presupposes the existence of another available forum in which the plaintiff can fully vindicate his or her rights. Accordingly, the court's concern that such other out-of-state forums might in fact be unavailable to a plaintiff provides no conceivable or rational basis for the Virginia legislature's decision to prohibit the application of *forum non conveniens* principles whenever the more convenient forum is located outside of Virginia.

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[12] Courts can also impose other conditions on *forum non conveniens* dismissals, including the defendant's consent to comply with the discovery rules of the original forum and to satisfy any judgment rendered against it in the alternate forum. *See, e.g., Dowling* v. *Richardson-Merrell, Inc.*, 727 F.2d 608, 611 (6th Cir. 1984); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867, (S.D.N.Y. 1986), *modified on app.*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987). Thus, it is well within the power of a court to eliminate the unspecified "other risks" of *forum non conveniens* dismissal to which the Virginia Supreme Court referred.

[13] *See, e.g., Dalton* v. *Consolidated Rail Corp.*, No. 54062 (Mo. App. Oct. 11, 1988) (available on LEXIS); *Barnes* v. *Southern Ry. Co.*, 116 Ill.2d 236, 507 N.E.2d 494, 501 (1987); *Wieser* v. *Missouri Pacific R.R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98, 105 (1983).

2. The non-dismissal provision of Virginia's *forum non conveniens* statute also bears no rational relation to the second interest asserted by the Virginia Supreme Court—the policy of Virginia's long-arm statute to extend the jurisdiction of Virginia courts to the maximum extent permitted by the Due Process Clause. There can be little question that the extension of the jurisdiction of state courts is a legitimate state interest. But, here, the non-dismissal provision of the *forum non conveniens* statute is not rationally related to this interest.

The court below confused the *forum non conveniens* doctrine and the concept of personal jurisdiction by assuming that the discretionary dismissal of an FELA action under that doctrine would have an impact on the jurisdiction of Virginia courts. Such a dismissal would have *no* effect on the ability of state courts to exercise personal jurisdiction to the extent permitted by the Virginia long-arm statute. Indeed, the application of the *forum non conveniens* doctrine constitutes the *exercise*—and not the *denial*—of jurisdiction by the court.

The doctrine of *forum non conveniens* applies only to transitory causes of action, where at least two courts have both personal and subject matter jurisdiction and where venue is proper. As this Court noted in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947), "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; *the doctrine furnishes criteria for choice between them*" (emphasis added).[14] An FELA cause of action is a "deliberately . . . transitory cause of action" in that there may be several forums where the cause of action could be brought. See *Pope* v. *Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 383 (1953). "Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue." *Gulf Oil*, 330 U.S. at 504. The doctrine of *forum*

[14] If a defendant is not amenable to process, then it is not within the applicable long-arm statute.

non conveniens only determines where the action may be brought—not whether a court has jurisdiction.

Accordingly, the application of *forum non conveniens* has no impact whatsoever on the jurisdiction of the courts of Virginia. By deciding that *forum non conveniens* dismissal is appropriate, a court recognizes that it has jurisdiction but simply declines to exercise that jurisdiction because a second court that also has jurisdiction offers a more convenient forum for the trial of the action. Thus, the non-dismissal provision of Virginia Code § 8.01-265 is not rationally related to the Commonwealth's asserted interest of extending the personal jurisdiction of Virginia courts as recognized in the Virginia long-arm statute.[15]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

WILEY F. MITCHELL, JR.
HENRY DEJ. LIGHT
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510
(804) 629-2600

REX E. LEE *
RONALD S. FLAGG
VINCENT F. PRADA
MICHAEL D. WARDEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Amicus Curiae

* Counsel of Record

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[15] Moreover, in the instant FELA case, the Virginia long-arm statute is not implicated at all. Like Norfolk Southern, Petitioner is incorporated in Virginia and is subject to the jurisdiction of the courts of that state without resort to the use of the long-arm statute. Thus, as applied in this case, the non-dismissal provision of the Virginia *forum non conveniens* statute is simply not related to the personal jurisdiction of Virginia courts under the long-arm statute.